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IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP. A/K/A GREEN TREE ACCEPTANCE CORP. A/K/A GREEN TREE FINANCIAL SERVICES CORP. N/K/A CONSECO FINANCE CORP.,
Petitioner,

v.

LYNN W. BAZZLE AND BURT A. BAZZLE, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED; DANIEL B. LACKEY, GEORGE BUGGS AND FLORINE BUGGS, IN A REPRESENTATIVE CAPACITY ON BEHALF OF A CLASS AND FOR ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR THE NATIONAL COUNCIL OF CHAIN RESTAURANTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The National Council of Chain Restaurants (hereinafter the "Council")[1] is a national trade industry group representing the interests of forty of the nation's largest multi-unit, multi-state chain restaurant companies. Collectively, these forty companies own and operate in excess of 50,000 restaurant facilities. Additionally, through franchise and licensing agreements, another 70,000 facilities are operated under their trademarks. In the aggregate, the Council's member companies and their franchisees employ in excess of three million individuals in all fifty states.

Many of the Council's member companies utilize arbitration agreements with their employees to effectuate the resolution of disputes arising out of the employment relationship in an arbitral rather than judicial forum. The benefits of arbitration are many and well-known, and the member companies that enter these agreements have found them to be highly effective at reducing costs for both parties, significantly decreasing the amount of time it takes to reach a resolution, and ultimately improving the lines of communication between employee and employer. However, for the reasons discussed in this brief, these impressive results would be undermined if this Court were to affirm the holding of the Supreme Court of South Carolina in the case before it.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amicus curiae*, its members, and its counsel. The written consents of the parties to the filing of this brief have been filed with the clerk.

SUMMARY OF ARGUMENT

The Council is confident that Petitioner, and the other *amici* supporting Petitioner, will persuasively argue for the adoption of the view taken by the majority of courts that courts and arbitrators may not proceed with class treatment of a dispute covered by an arbitration agreement that is silent as to, or affirmatively waives, such class treatment. The Council would like to emphasize, however, the importance, popularity, and effectiveness of arbitration agreements in the employment setting, and respond to Respondents' arguments in favor of class treatment, from the employment perspective.

1. Both employees and employers benefit greatly from the use of arbitration agreements. In addition to the advantages of arbitration which are generally applicable to all settings, such as reduced costs and increased speed of resolution, the Council will describe how workplaces have benefitted from arbitration rules tailored to the employment setting and decision-makers with expertise in the field of employment law. Moreover, the Council will explain how employers utilizing arbitration agreements have received an additional benefit from their use of these agreements -- improved relationships and communications with their employees. Because the use of arbitration agreements in the employment relationship is nearly always coupled with a progressive and multi-faceted internal grievance resolution procedure, concerns are being raised and *resolved* earlier, most often before the formal arbitration stage. Both employees and employers benefit from this improved avenue for communication.

2. Respondents' arguments in favor of forcing class treatment upon parties who did not expressly contract for the same are particularly inapplicable in the employment

setting. Class actions are a procedural device, not a substantive right. To allow procedural devices to trump the substantive rights afforded by the contract language itself, and by the statutory language of the Federal Arbitration Act, is to skew the very essence of American jurisprudence. This brief will challenge the argument of the minority view that absolute guarantee of class treatment is necessary to protect the claims of individuals that may be too small to pursue individually. Employment law statutes almost universally provide for compensation for intangible damages, punitive damages, and/or liquidated damages, any of which could be substantial. Moreover, these statutes provide for attorneys' fees for prevailing plaintiffs, and, therefore, counsel should not be dissuaded from assisting clients with such claims.

The Council urges this Court to continue to rebuke hostility towards arbitration by reversing the decision below, thereby ensuring that this valuable tool in the employment setting is not jeopardized.

ARGUMENT

I. ARBITRATION IS AN EFFECTIVE TOOL FOR THE RESOLUTION OF DISPUTES IN THE EMPLOYMENT SETTING.

The virtues of arbitration are abundant. In addition to the oft-cited reduced costs and quicker resolution associated with arbitrated claims as compared to litigated cases, an agreement to arbitrate can be tailored to meet the specific needs of the types of disputes the parties are likely to encounter. The same cannot be said of civil litigation, in which the same rules and procedures apply to virtually all cases, regardless of the nature of the dispute.

Highlighting this significant difference, the American Arbitration Association, the nation's preeminent organization of arbitrators, has no less than nine separate and unique sets of rules and supplementary rules for arbitration of disputes arising in different settings. These focus areas include commercial (which includes separate due process protocols for the health care industry and for consumer-related disputes, as well as supplementary procedures for consumer-related disputes, for intra-industry U.S. insurance and reinsurance, and for securities), construction, employment, uninsured motorist accidents, international, and labor. These specialized rules and protocols are designed to specifically address the unique characteristics of disputes in each field.

An additional advantage to arbitration also significant in the employment setting is the expertise of the decision-makers. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 170 F.3d 1, 8 n.4 (1st Cir. 1998) (". . . arbitration may also allow parties to select arbitrators with expertise in the subject matter of the dispute."), citing Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 Lab. Law. 21, 33 (1997). The employment law arbitrators sanctioned by the American Arbitration Association have particular expertise in employment law. Their venerable positions have included professor of employment law, special assistant to the Solicitor of Labor, in-house labor counsel, administrative judge/hearing examiner for the Equal Employment Opportunity Commission, attorney for the Department of Labor Benefits Review Board, senior trial judge with the Equal Employment Opportunity Commission, and litigation attorney with the National Labor Relations Board, to

name just a few.[2] Employment law arbitrators have dedicated their careers to the practice of labor and employment law, representing both plaintiffs and defendants. With the complex and fact-intensive issues that often arise in employment claims, this level of expertise is invaluable and often times far superior to the employment law knowledge possessed by judges or juries.

In the employment setting, arbitration has been successful on so many levels because it is not simply a choice-of-forum for the final resolution of a dispute, but is often one component of an overall culture of progressive and flexible resolution. This culture fosters improved communications between employees and management and enables employers to be pro-active rather than reactive to the concerns of its workforce. For instance, most arbitration agreements in the employment setting require that an employee first raise his or her concern with a manager or human resources official. Because so many employment disputes are based on misunderstandings, this required step often heads off disputes before they start. Indeed, the arbitration agreements of the Council's member companies often include several steps for internal grievance resolution (including, for example, open

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[2] *See, View Resume - [James N. Adler, Esq.]* (visited Feb. 20, 2003) <http://208.240.224/resume.asp?Name=146577>; *View Resume - [Cindy L. Anderson, Esq.]* (visited Feb. 20, 2003) <http://208.240.224/resume.asp?Name=140182>; *View Resume - [Loretta T. Attardo, Esq.]* (visited Feb. 20, 2003) <http://208.240.224/resume.asp?Name=122222>; *View Resume - [Carolyn Cairns, Esq.]* (visited Feb. 20, 2003) <http://208.240.224/resume.asp?Name=124881>; *View Resume - [William E. Caldwell, Esq.]* (visited Feb. 20, 2003) <http://208.240.224/resume.asp?Name=111153>; and *View Resume - [Turna R. Lewis, Esq.]* (visited Feb. 20, 2003) <http://208.240.224/resume.asp?Name=147597>.

door policies, peer reviews, and internal mediation), thereby increasing the likelihood that a resolution will be reached without the need for outside mediation or arbitration.

This progressive grievance system is commonly used in the employment setting. This system is significant not only because it reduces the number of claims that ultimately result in arbitration, but also because it offers the employer valuable feedback from its employees who have concerns. This feedback allows employers to continually improve the working environment and ensure fair treatment to all of its employees. In addition, progressive grievance systems, and arbitration itself, allow for the resolution of disputes while maintaining the employment relationship. *See Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 936 (4th Cir. 1999) ("... the adversarial nature of litigation diminishes the possibility that the parties will be able to salvage their relationship.").

In addition, grievance procedures provide employees with an invaluable opportunity to fully voice their complaints. Too often in litigation, litigants (particularly employees) are left feeling as if they were never able to "tell their side of the story" because of the restrictive procedural rules. Because an individual's employment relationship is often the second-most important relationship in his life behind his family, the inability to thoroughly air a grievance when this relationship becomes strained can be crushing. Internal grievance procedures, and the arbitration process itself, encourage open communication between the parties, offering a level of satisfaction often lacking in litigation.

To further highlight the mutuality of the benefits of arbitration to both employers and employees, it is important to note the success-rate employees enjoy in arbitration. During the years 1993 through 1995, employees won 63 percent of

their cases before arbitrators with the American Arbitration Association, compared to only 15 percent of employees who pursued their claims in federal court in 1994.[3] Lewis Maltby, *Employment Arbitration: Is It Really Second Class Justice?*, 6 NO. 1 Disp. Resol. Mag. 23, 23 (1999). Much of this disparity is due to the fact that the majority of employment cases before a court are resolved by summary judgment, in which employers prevail an incredible 98 percent of the time. *Id.* at 23-24. However, summary judgment is nearly non-existent in arbitration. *Id.*

Given the success of arbitration agreements in the employment setting, the speed with which their use is growing is not surprising. In 2000, more than 500 employers, employing more than 5 million employees, used the services of the American Arbitration Association to resolve employment disputes. *See* American Arbitration Association, 2000 Annual Report, at 30. The Association informs the Council that those numbers have now risen to 800 employment arbitration programs, covering approximately 7 million employees.

These increasing numbers are particularly important given that employment-related litigation has increased by an astonishing rate throughout the last three decades and currently represents a significant portion of the federal judicial caseload.

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[3] These arbitration success-rates are also significantly higher than the success-rates of charging parties before the Equal Employment Opportunity Commission, who during those three years issued no probable cause determinations in approximately 52 percent of its charges and characterized less than 15 percent of its charges as "merit resolutions," meaning a resolution that involved a finding of probable cause, a settlement, or a withdrawal with benefits. Equal Employment Opportunity Commission, *Enforcement Statistics, All Statutes Fiscal Year 1992 - Fiscal Year 2001* (last modified Feb. 6, 2003) <http://www.eeoc.gov/stats/all.html>.

In 2002, employment litigation represented nearly fourteen percent of the more than one-quarter million cases filed in United States District Courts. Office of Human Resources and Statistics, Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics March 31, 2002*, at 44-46 (2002). But for the increasing use of arbitration agreements in the last several years and the resolution of disputes through internal grievance procedures, would these numbers be higher? Very likely.

In the two decades between 1971 and 1991, employment law cases saw a staggering 400 percent increase in the federal district courts. *Discharge Is Now Major Focus of Job Discrimination Suits*, Daily Lab. Rep. (BNA) No. 164, at A-3 (Aug. 23, 1991). Between 1990 and 1998, the number of employment civil rights claims increased by an additional 300 percent. Marika F. X. Litras, Ph.D., U.S. Dep't of Justice, *Civil Rights Complaints in U.S. District Courts, 1990-98*, NCJ 173427, Jan. 2000, at 2. Interestingly, however, the number of these claims decreased by more than ten percent between 1998 and 2001 (and the number dropped still lower in 2002)[4] – the very same period in which arbitration usage has increased.

This Court has recognized the appropriateness of arbitration agreements in the employment setting. "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). The Court

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[4] *Federal Judicial Caseload Statistics March 31, 2002* at 45 (21,152 employment civil rights claims in 2001 and 21,117 in 2002) and Litras at 2 (23,735 employment civil rights claims in 1998).

went on to note that ". . . there are real benefits to the enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Id.*, citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-32 (1991). Indeed, arbitration is mentioned favorably in the very language of the Civil Rights Act of 1999. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991) (". . . the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of federal law amended by this title.").

Despite arbitration's overwhelming judicial and congressional support in theory and its monumental success in practice, some courts continue to exhibit the very hostility and suspicion towards arbitration that this Court has for decades been demanding they not display. This case offers another opportunity for this Court to rebuke such hostility and suspicion, reenforce its support of arbitration, and encourage a judicial environment in which employers will continue to utilize this mutually-beneficial resolution tool.

II. INDIVIDUAL RESOLUTION OF EMPLOYMENT DISPUTES FULLY ACHIEVES THE GOALS BEHIND EMPLOYMENT-RELATED STATUTES.

This Court has insisted that the statutory protections afforded employees can be realized through the use of arbitration.

> The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the

> policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law; as we noted in *Gilmer*, "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.'"

Circuit City, 532 U.S. at 123, citing *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). The Council moves, then, to the analysis of whether these same protections are jeopardized by individual, rather than class, treatment of claims. The Council urges this Court to adopt the position of the majority of courts and hold that they are not.

As Petitioner and other *amici* undoubtedly will point out, the overwhelming majority of courts that have addressed the issue have decided that an arbitration agreement that (through silence or affirmative waiver) eliminates the ability to proceed as a class is not thereby rendered unenforceable. The Council will focus, therefore, on the cases addressing arbitration agreements in the employment context. *See, e.g., Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, 665 n.7 (S.D.N.Y. 1997) (". . . a plaintiff . . . who has agreed to arbitrate all claims arising out of her employment may not avoid arbitration by pursuing class claims. Such claims must be pursued in non-class arbitration."), citing *Champ v. Siegel Trading Co.*, 55 F.2d 269, 276-77 (7th Cir. 1995).

Courts analyzing the enforceability of employment arbitration agreements have been persuaded by the treatment of the class action issue in other settings, such as claims under the

Truth in Lending Act (TILA). In determining "whether the inability of parties to bring a class action in arbitration proceedings renders invalid the arbitration clause," the Southern District of West Virginia relied on the "well-reasoned" opinion of the Third Circuit in *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001). *See Adkins v. Labor Ready, Inc.*, 185 F. Supp. 2d 628, 645 (S.D.W.V. 2001) ("*Adkins I*"), *aff'd*, 303 F.3d 496 (4th Cir. 2002) ("*Adkins II*").

In *Johnson*, the Third Circuit held that even if the TILA and the Electronic Fund Transfer Act implied a right to proceed as a member of a class, "rights of this nature are waivable so long as the rights the statute was designed to protect may be vindicated by other means." *Johnson*, 225 F.3d at 373. In *Adkins I*, the District Court applied this same reasoning to a case involving the Fair Labor Standards Act (FLSA), which provides for collective actions on an opt-in basis. "There is no language in the FLSA which expressly prohibits an individual from contractually waiving his right to assert FLSA claims via a class action mechanism." *Adkins I*, 185 F. Supp. 2d at 646. In affirming the District Court, the Fourth Circuit utilized this same standard for resolving the issue:

> [Plaintiff] points to no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute. His inability to bring a class action, therefore, cannot by itself suffice to defeat the strong congressional preference for an arbitral forum.

Adkins II, 303 F.3d at 503.

Applying this same standard for discerning congressional intent regarding the waivability of a right to a class action, we reach the same result when analyzing the other major employment statutes as the Fourth Circuit reached regarding the FLSA.[5] Nothing in the text, legislative history, or purposes of these statutes confers a nonwaivable right to bring claims under the statute on a class basis. Indeed, with the exception of the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act, both of which cross-reference or utilize the enforcement procedures of the FLSA, these statutes do not speak to class treatment by private parties at all. *See, e.g., General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982) ("Title VII . . . contains no special authorization for class suits maintained by private parties.").

Most persuasive as to this issue is this Court's own language in *Gilmer v. Interstate/Johnson Lane Corporation*, rejecting the plaintiff's argument that arbitration of a claim under the ADEA should not be compelled because the arbitration agreement did not provide for class actions. This Court reasoned that ". . . 'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.'" *Gilmer*, 500 U.S. at 32, quoting *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting).

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[5] *See* Civil Rights Act of 1964, as amended (Title VII), 42 U.S.C. § 2000e, *et seq.*; Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. 12101, *et seq.*; Age Discrimination in Employment Act (ADEA) of 1967, as amended, 29 U.S.C. 621, *et seq.*; Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1001, *et seq.*; Equal Pay Act of 1963, 29 U.S.C. § 206(d); Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601, *et seq.*

The class action is nothing more than a procedural device. It is not a substantive right, and allowing it to trump the substantive rights of parties to arbitration agreements that are afforded by contract law and by the Federal Arbitration Act is entirely unjustified. One court has eloquently explained

> Rule 23 is a procedural device provided by Congress to allow the court discretion in applying class action status to plaintiffs and those other class members similarly situated. The right to arbitration is contractual and therefore substantive. Congress did not intend that procedural class action certification be used to abrogate the contractual rights employed in the execution of the arbitration agreements . . .

Sanders v. Robinson Humphrey/American Express, Inc., 634 F. Supp. 1048, 1065 (N.D. Ga. 1986). *See also In re Piper Funds*, 71 F.3d 298, 302-03 (8th Cir. 1995) (holding that a party's "contractual and statutory right to arbitrate may not be sacrificed on the altar of efficient class action management"); *Carter v. Countrywide Credit Indus., Inc.*, 189 F. Supp. 2d 606, 618-19 (N.D. Tex. 2002) (enforcing an arbitration agreement that precluded employees from pursuing FLSA claims collectively, noting *Gilmer*'s holding "that the inability to proceed as a class action and the limitations on discovery were not substantive rights that prevented arbitration of the claims").

This Court has acknowledged that procedural rights provided by a judicial forum may be sacrificed in exchange for the many benefits of arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (by agreeing to arbitrate a statutory claim, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration"). The

ability to bring a class action is one of "the procedures . . . of the courtroom" that a party trades when it becomes a party to an arbitration agreement that does not expressly allow for class treatment.

The South Carolina Supreme Court concluded that "parties with nominal individual claims, but significant collective claims, would be left with no avenue for relief and the drafting party with no check on its abuses of the law." *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 361 (S.C. 2002). But this justification for implying a right to bring a class action in arbitration misses the mark. First, a party's damages do not change depending on whether he pursues his claim on an individual or class basis. His rights to relief will be the same either way.[6] In the employment setting, moreover, intangible damages (such as pain and suffering), punitive damages, or liquidated damages often are available, offering the prospect of significant monetary claims. Therefore, few claims in the employment setting are so insignificant as to make individual pursuit so unlikely that an individual remedy is the equivalent of "no avenue for relief."

Second, all of the relevant employment statutes provide for attorneys' fees for prevailing parties.[7] Such provisions

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[6] Compare, also, Title III of the Americans with Disabilities Act, which provides for no monetary relief whatsoever to plaintiffs who bring suit under the Act for barriers to accessability to public accommodations. Plaintiffs in these cases have apparently not felt they had "no avenue for relief" based on this fact, given that thousands of suits under Title III have been filed by individual plaintiffs since its enactment in 1990.

[7] *See* 29 U.S.C. § 216(b); 42 U.S.C. § 2000e-5(k); 42 U.S.C. 12205; 29 U.S.C. 626(b), cross-referencing 29 U.S.C. 216(b); 29 U.S.C. § 1132(g); 29 U.S.C. § 2617(a)(3).

ensure the ability to retain an attorney to assist with the pursuit of a claim under any such statute. Furthermore, claims potentially affecting more than one individual would be that much more attractive to an attorney. Even if claims cannot be pursued on a class basis, the attorney nevertheless would have multiple claims with similar issues, thereby reaping the benefits of prior research, analysis, and drafting. In addressing this point in an FLSA case, a District Court noted,

> While legal representation for individual claims with small amounts at stake in the arbitral forum may lack the vigor of legal representation for large class actions proceeding in a judicial forum, attorneys should nevertheless not be dissuaded from bringing individual FLSA claims of a small monetary value within the arbitration forum, particularly when, as here, there are a large number of related cases.

Adkins I, 185 F. Supp. 2d at 646.

If we are concerned that the individual claim is somehow less alluring to attorneys because they prefer to be involved in high-stakes class arbitration, then we must ask ourselves who we are trying to appease by forcing class arbitration on parties to an agreement when the arbitration agreement does not provide for class treatment: Congress, which drafted the respective statutes under which these claims are being brought, or attorneys?

The purpose of class actions is judicial economy. *General Tel. Co. of Southwest*, 457 U.S. at 161 (1982) (Burger, C.J., concurring). Arbitration of claims is the ultimate in judicial economy because it removes cases from the over-crowded court system. With employment litigation

representing fourteen percent of the judicial caseload, and employment-litigation increasing by as much as 600 percent in the last three decades, any tool that is able to reduce the number of prospective employment cases filed in federal courts should be applauded and encouraged. The Council believes Congress and this Court have done both.

However, if the Court were to accept the minority view on this issue and hold that arbitration may proceed on a class basis absent contract language providing for such class treatment, as articulately argued by fellow *amicus* the Chamber of Commerce of the United States, arbitration as it now exists will be jeopardized. Employers will either radically formalize their arbitration agreements to provide significant procedural protections (thereby eradicating the primary purpose of arbitration agreement: simplicity and informality) or they will simply forgo arbitration altogether. If class arbitration is forced on parties, too much would be at stake to utilize the informal procedures of the current and advantageous arbitration structure.

The Council urges the Court to hold parties to the bargained-for provisions of the agreement as written, so that this highly effective dispute-resolution tool of arbitration can continue to provide significant benefits to employers and employees alike. Arbitration in the employment setting is building speed, and, absent discouraging case law, it will undoubtedly have significant positive effects, not only on the judicial caseload, but on the very culture of the working environment.

CONCLUSION

The judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted,

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